SANDY C. BAICY

IBLA 79-379 Decided March 19, 1980

Appeal from decision of the Idaho State Office, Bureau of Land Management, rejecting desert land entry application I-13945.

Affirmed as modified.

1. Desert Land Entry: Generally -- Desert Land Entry: Applications

   Where an applicant, with a preference right of entry, fails to properly execute and sign the application for a desert land entry, the applicant's preference right of entry is extinguished; the application, however, may be treated as a regular application with priority established from the date of signing.

2. Desert Land Entry: Generally -- Desert Land Entry: Applications -- Words and Phrases

   "Resident citizen." As used in sec. 2 of the Act of March 3, 1891, 26 Stat. 1096, 43 U.S.C. § 325 (1976), the term "resident citizen" refers to someone who is actually living in the State at the time of entry, and does not refer to individuals who have established tax or voting residency within a state but who are not actually residing therein.

APPEARANCES: Sandy Baicy, pro se.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

Sandy C. Baicy appeals from a decision of the Idaho State Office, Bureau of Land Management (BLM), dated April 9, 1979, extinguishing

her desert land entry preference right, rejecting her desert land entry application and establishing in Quayle M. Waddell a priority of filing on lands located in T. 1 N., R. 1 E., Boise meridian, Idaho, SE 1/4 sec. 19, NE 1/4 sec. 30. Appellant was awarded a preference right of entry pursuant to the regulation, 43 CFR 2521.8, on the basis of her successful private contest of desert land entry I-3420, which had been held by Amelia Guderjohn. The decision awarding the preference right of entry allowed appellant 30 days from the date of receipt of the decision in which to exercise her preference right by filing an application therefor.

The record shows she received the decision on October 7, 1977, and filed her application of desert land entry on the same date. A conflicting desert application, I-13914, had been filed for the same lands on September 28, 1977, by Quayle M. Waddell. On February 23, 1978, appellant's application was posted to the official records, after which it was referred for review as to its completeness and acceptability. During the course of the review it was discovered that appellant had failed to sign or date her application when it was filed on October 7, 1977. The application was rejected for this reason, inter alia, by the State office decision of April 6, 1979.

[1] The applicable regulation, 43 CFR 2521.2, requires that an application for desert land entry must be properly executed and signed by the applicant. Since appellant did not either sign or date her application, it was not properly executed pursuant to the regulation. This defect was fatal to appellant's application. The fact that on April 3, 1978, appellant signed and back dated her application did not cure the defect. Appellant's preference right was extinguished when she failed to file a proper application timely. The signing of her application on April 3, 1978, could afford her no priority over applications filed prior thereto.

On April 27, 1978, Quayle M. Waddell, the prior desert land entry applicant, submitted a signed statement to BLM which was received on May 8, 1978. This statement indicated Waddell agreed to relinquish his prior desert land entry application in favor of the appellant. The statement further indicated he had no intention of contesting approval of her application if allowed before his own and that he did not want BLM to contest Sandy C. Baicy's application on his behalf. As a result of this waiver, even though the preference right was extinguished, Sandy C. Baicy acquired first priority for consideration of a regular desert land entry application for the parcel in question.

[2] The State office decision of April 6, 1979, also held that the application was subject to rejection due to the failure of appellant to maintain residency in the State of Idaho. The relevant statute, 43 U.S.C. § 325 (1976), provides: "Excepting in the State of Nevada, no person shall be entitled to make entry of the desert lands

unless he be a resident citizen of the State or Territory in which the land sought to be entered is located."

The record indicates that although appellant stated on her application that she resided at Box 153, Kuna, Idaho 83634, she only lived there for a few months. A special agent of BLM submitted an investigation report that revealed that appellant and her husband were married and lived in the State of Washington from June 18, 1973, until she was terminated at Boeing Aircraft on November 11, 1976. When appellant was rehired June 1977 she stated in a personnel memo that she had lived with her husband in Idaho. Appellant has remained employed in the State of Washington from June 1977 to the present with one 4-month interval, February 1978 to June 1978, for maternity leave. 1/

Appellant, for her part, argues that she and her husband pay property taxes in the State of Idaho; pay Idaho income taxes; are registered voters in Ada County, Idaho; and send Mr. Baicy's son to the Kuna Elementary School, in Kuna, Idaho. Appellant states that because of economic conditions she and her husband are forced to work two jobs; one for Boeing in the State of Washington, and the other farming her husband's patented entry in Idaho, which they allegedly do in the spring and summer months. Appellant also avers that due to difficulties with pregnancies, she has been required to remain in the Seattle area.

While it may not be disputed that for purposes of taxation and voting appellant has established residency in the State of Idaho, the question which we must examine is whether appellant qualifies as a "resident citizen" within the meaning of the 1891 amendments to the Desert Land Act. For the reasons stated below, we hold that the answer must be in the negative.

As originally enacted, the Desert Land Act contained no requirement that the entryman be a "resident citizen" of the State or Territory in which the land sought to be entered was located. Act of March 3, 1877, 19 Stat. 377, 43 U.S.C. § 321 (1976). This requirement was added by the Act of March 3, 1891, 26 Stat. 1096. This phrase was subsequently interpreted as meaning "all persons living in such State or Territory and entitled to protection in the exercise of civil rights without regard to their political rights, and must be read in

1/ The succession of addresses for appellant, 10701 SE 196th Street, Renton, Washington; East Hill Apartments, No. 306C, 25236 106th Avenue, Kent, Washington; 12436 SE 27th, Bellevue, Washington; 20857 SE 108th, Kent, Washington; and 10427 SE 218th, Renton, Washington, were verified by utility companies, the telephone company who provided appellant with services, and appellant's employer in the State of Washington.

conjunction with the provisions of sections one and seven of said Act [of March 3, 1891, supra]." Instructions, 14 L.D. 677, 680 (1892); accord, John Davidson, 15 L.D. 343 (1892).

Thus, it was held that the fact that someone was not possessed of the right to vote was irrelevant in determining whether he or she was a resident citizen. The case most clearly on point with that presented herein is Pettet v. McCormick, 34 L.D. 586 (1906). In that case, appellant McCormick had left his wife in Kentucky and had travelled to New Mexico for the express purpose of establishing a new and permanent home if he found the country suitable. Having determined to relocate in the New Mexico Territory, McCormick purchased the relinquishment of a former entryman "being assured that it was the common and prevailing practice to make entry for lands and then return to close up business elsewhere and within six months remove the family to the land." Id. at 587. In accord with this perception, McCormick returned to Kentucky, disposed of his effects, and returned with his family to New Mexico, within 6 months of the initiation of the entry. His entry was subsequently cancelled by the Commissioner of the General Land Office on the ground that he was not a "resident citizen" of New Mexico at the time he made his entry.

In reversing the decision of the Commissioner, Secretary Hitchcock noted:

> It is clear that a change of residence was contemplated and agreed upon by claimant and his wife before he left Kentucky in April, 1904, subject only to his favorable impression of the country where his brother had already located. That conclusion had been reached and that purpose declared prior to and at the time when the entry in question was made. It will not be questioned that, had he remained in said Territory from that time forward and sent for his family to join him his resident citizenship and his entry would be unassailable. If the entry is to be canceled, therefore, it must be for the reason that he again departed from said Territory. But he took his departure with the declared purpose of disposing of his effects and returning to this land with his family, and this purpose was carried into effect within the six months allowed after entry, under the general homestead law, for establishing residence on the land. Manifestly the Territory in which he was, which he had chosen for his permanent home, and which he left with the avowed purpose of returning thereto and remaining permanently therein, is to be regarded as the place of his residence and citizenship rather than the State which he left with the avowed purpose of seeking and making his home elsewhere, to which he returned for the sole purpose of disposing of his effects and removing his family therefrom, and where he ceased to

> exercise the voting privilege of a citizen by reason of his said announced purpose and procedure of removal.
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> It is true that at date of this entry he had not become a voting resident of that Territory. The proper distinction is to be drawn between the political residence to be acquired before voting, and the actual being and living in a State or Territory with the intention of making a permanent home therein. In this latter sense the Department is of the opinion that the claimant was in position properly to make the affidavit required and that the entry must be held intact. [Emphasis supplied.]

Id. at 588-89.

The instant appeal discloses exactly the reverse situation. Herein, appellant possesses all the indicia of political residence, but it is also clear, from appellant's statement of reasons, that she is not living in Idaho, but in Seattle, Washington, owing to economic factors and the needs of her child. In conformity with the consistent interpretation of the Department that the term "resident citizen" refers to one actually living in the State at the time of entry, appellant's application, even if treated as a regular priority application, must be rejected.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed as modified.

James L. Burski
Administrative Judge

ADMINISTRATIVE JUDGE FISHMAN CONCURRING:

Although it might appear at first blush that appellant is a domiciliary of the State of Idaho, the term "resident citizen" employed in the Desert Land Act, 43 U.S.C. § 325 (1976), often has a discrete meaning.

A lucid discussion of domicile is set forth in United States v. Cooke, 59 I.D. 489, 501-2 (1947) as follows:

> The basic principles common to these questions of domicile and homestead residence are set forth in the discussions of domicile in textbooks on the conflict of laws. These all show that the term domicile, derived from domus, the Latin word for home, is intimately bound up with the concept "home" and a whole complex of related ideas. In the much-quoted, classic definition, which he adopted from the Roman law, Mr. Justice Story, writing in 1841, said:
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> > By the term domicil, in its ordinary acceptation, is meant the place where a person lives or has his home. In this sense the place where a person has his actual residence, inhabitancy, or commorancy, is sometimes called his domicil. In a strict and legal sense that is properly the domicil of a person where he has his true, fixed, permanent home and principal establishment, and to which, whenever he is absent, he has the intention of returning (animus revertendi). 12/ [Italics supplied.]
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> Mr. Story suggested, however, that a more correct statement might be that that place is properly the domicile of a person --
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> > * * * in which his habitation is fixed without any present intention of removing therefrom. 13/ [Italics supplied.]
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> Other writers use variant phraseology in their definitions of domicile, but all agree that mere bodily presence in a new place does not by itself initiate a

12/ Joseph Story, "Commentaries on the Conflict of Laws," sec. 41, p. 40 (8th ed.), by Melville M. Bigelow (Little, Brown, and Co., Boston, 1883).
13/ Op. cit., sec. 43, p. 43.

domicile of choice. The actual residence, or bodily presence, must be accompanied by a certain intent if the place of new sojourn or physical habitancy is to be converted into such a home as makes the basis of legal domicile. In other words, a domicile of choice can be established only by intent and by act, animo et facto. It is not otherwise with homestead entry. These same principles underlie the terms of the homestead law. Under sections 2290, 2291, and 2297, Revised Statutes, the homestead applicant is required to swear that his "purpose," or intent, is "in good faith to obtain a home for himself," and besides making sworn declaration of that intent, he is required to perform the act, namely, to establish actual permanent residence upon the land within 6 months from the date of entry.

The chief rules implementing these common principles, here phrased with particular reference to homestead rather than domicile, are as follows: First, there must be intent to make the desired public lands the applicant's home, or fixed abode. This intent is called the animus manendi, the intent to remain, and implicit in it, of course, is the intent no longer to have a home at the former residence, or domicile; second, there must be actual bodily presence on the lands entered, this act of inhabitancy of the entry being called the factum. Moreover, these two elements must coexist. The mere intent to acquire a new home on the desired lands, if unaccompanied by the factum of bodily removal to the entry and bodily presence there, avails nothing; nor does the fact of removal and presence if those acts be not animated by intent.

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* * * An established domicile continues until the domiciliary decides to make a change of home and acts to effect it. It persists independently of absences of whatever duration or purpose. To the homestead entryman, on the other hand, absences are permitted only with limitations, and homestead residence is held to continue only if those limitations be observed. In some States, statutes controlling particular rights, such as voting, office holding, suing for divorce, etc., require as conditions precedent for the exercise of those rights not only an established domicile but actual residence for a prescribed time in addition. 15/ Similarly, the homestead

15/ Vernier, "American Family Laws" (to January 1, 1931), secs. 81, 82, 122, 123, as to residence requirements for

law conditions the exercise of the homestead right to obtain title to the entry not only upon the establishment of the homestead residence as above described but upon its maintenance by actual residence, bodily presence, throughout a 3-year period, except for absences of 5 months in each year.

[fn. 15/ (continued)]
divorce (Chester G. Vernier, assisted by Benjamin C. Duniway, Stanford University Press, 1932); 1 Stimson, "American Statute Law" (to January 1, 1886), pp. 59, 60, secs. 241, 242, as to residence requirements for suffrage, office holding, etc. (Frederic J. Stimson -- Charles C. Soule, Publisher, Boston, 1886).

Cooke's demarcation between "domicile" and "residence" is fully consistent with the Department's construction of resident farm owners embodied in the Act of May 16, 1930, 43 U.S.C. § 424(a) (1976), relating to the disposal of reclamation lands classified as temporarily or permanently unproductive.

The words "resident farm owner" mean a farm owner who is actually residing on the farm he owns. The nature of the residence required is personal presence and physical occupation on the premises as a home. Solicitor's Opinions, M-32095 (approved by the Assistant Secretary, April 23, 1943), and M-33218 (approved by the Assistant Secretary, July 29, 1943 -- Shoshone Project).

I agree that the term "resident citizen" requires actual occupancy and that appellant was not a "resident citizen" of the State of Idaho, even though she may have been domiciled in that State.

Frederick Fishman
Administrative Judge

ADMINISTRATIVE JUDGE GOSS DISSENTING:

Appellant has submitted considerable evidence in an attempt to prove that she is a "resident citizen" of Idaho under 43 U.S.C. § 321 (1976). As a part of such evidence, appellant and her husband affirm:

> John Baicy's son * * * attends the Kuna Elementary School in Kuna, Idaho. * * *
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> * * * * * * *
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> In order for the Baicys to succeed in their farming effort they have had to work two jobs for several years. One job has been the development and operation of the 160-acre farm [in Idaho] during the spring and summer.

Before ruling on the case, I would call on appellant to furnish detailed dates as to the time she spent in Idaho from January 1, 1977. I agree that the statutory term "resident citizen" connotes a substantial physical presence. Nevertheless, under Pettet v. McCormick, supra, continuous physical presence is not required where there is sufficient other indicia.

Joseph W. Goss
Administrative Judge